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In The Supreme Court of the United States

AZEL P. SMITH, et al.,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI and POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents a membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the Courts of Appeals, including numerous employment discrimination cases.

The Chamber fully endorses the Age Discrimination in Employment Act. Reliance on age stereotypes about the abilities of older workers should not be tolerated. Due to natural job progression, however, age is often correlated with job terms such as compensation, pension, and seniority. In this context, and where Congress did not so intend, imposing a burden on employers to justify the business necessity of routine and uniform job standards that statistically impact older workers is unjustified.

SUMMARY OF THE ARGUMENT

The disparate impact theory, first recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a race discrimination case under Title VII of the Civil Rights Act of 1964, does not apply to age discrimination claims. When Congress passed Title VII, it expressly recognized that age discrimination differs from other forms of discrimination.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part, and no one other than *amicus curiae*, its members, or counsel made a monetary contribution to the brief's preparation or submission. S. Ct. R. 37.6.

Weighing in Congress' effort to balance employees' and employers' interests in any age legislation was the reality that "a person's age catches up to him" and "diminishes his capacity and competence." *See Age Discrimination in Employment: H'gs on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 36, 37 (1967) [hereinafter "*Senate Hearings*"]. This had no analogue in Congress' consideration of invidious racial prejudice under Title VII. Therefore, Congress directed the Secretary of Labor to assess whether legislation was necessary to "prevent arbitrary discrimination in employment because of age." Civil Rights Act of 1967, Section 715.

Based on the Secretary of Labor's recommendations, Congress enacted the Age Discrimination In Employment Act (ADEA) and designed its proscriptions to redress only "arbitrary discrimination," s*ee* 29 U.S.C. §§ 621, 623, which resulted from inaccurate and stigmatizing age stereotypes. Congress decided that other factors adversely affecting older workers' employment were more suitably addressed by education and training programs.

In *Griggs*, the Court adopted the disparate impact theory, but the Court grounded that theory in the purpose or objective of Title VII rather than in any specific statutory language. The Court subsequently extended the theory to other Title VII contexts, to redress institutional or societal bias that has produced "built-in headwinds," "glass ceilings," or "barriers" to the advancement of protected groups. The Court has not, however, extended the disparate impact theory to claims under the ADEA. That is not surprising.

Unlike groups protected by Title VII, older workers have not suffered from lifelong barriers to advancement due to the perpetuation of effects of historical discrimination. Rather, as Congress recognized in passing the ADEA, older

workers are affected by stereotypes that develop only as age progresses. The disparate treatment theory, which focuses on motive, is specifically designed to test for age stereotyping, and it is the sole cause of action intended by Congress. This Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), leads directly to this result.

Under the language of the ADEA, an inquiry into motive is necessary and the most suitable means to root out age stereotyping. Reading motive out of the ADEA to allow disparate impact claims would upset the balance struck by Congress. If such claims were available, statistical correlation—having nothing to do with motive—would become dispositive, subject only to the employer's proof of business necessity. Employers, though not motivated by age, would be forced to justify the business necessity of considering factors such as seniority or pay which, because they correlate with age, may have a statistical impact on older workers.

Because age-motivation is required by the language of the statute, and is an element only under the disparate treatment theory, the disparate impact theory is not cognizable under the ADEA. Although an EEOC guideline purports to create an ADEA disparate impact claim, it is contrary to the statute's language. Neither as originally enacted nor as amended does the ADEA include a disparate impact claim.

ARGUMENT

Petitioners' argument that the ADEA authorizes disparate impact claims relies on the similarity in language between the ADEA's liability provision at 29 U.S.C. § 623(a)(2) and Title VII's liability provision at 42 U.S.C. § 2000e-2(a)(2), which this Court cited in *Griggs* when it first recognized the disparate impact cause of action. Pet. Br. 11-

17, 22, 36. As the Court recently emphasized, however, the presumption that the same words have the same meaning—even when used in the *same* statute—is not irrefutable. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1245-46 (2004). In fact, the presumption "is not rigid" and will yield when there is reason to believe that Congress intended the words to have different meanings. *See id.* at 1245. That is even more so when the words are used in different statutes addressing different problems. Although § 623(a)(2)'s language admittedly is the same as the Title VII language cited in *Griggs*, other textual provisions as well as the background of both statutes and the rationale underlying *Griggs* show that the statutes should be interpreted differently.

I. The *Griggs* Rationale Does Not Extend To Employment Decisions Affecting Older Workers.

In *Griggs*, a Title VII case alleging race discrimination, this Court first articulated the disparate impact cause of action. Duke Power had openly segregated job titles by race prior to the effective date of Title VII. 401 U.S. at 427. Upon enactment of Title VII, it adopted a policy requiring a high school diploma or passing scores on two aptitude tests for placement into higher paying jobs. These requirements disparately affected African-American employees. The Court found that the disparate effect was "directly traceable to race," because the long history of societal racism and inferior education in segregated schools had deprived many black employees of the means to manifest their true abilities through standardized tests. *Id.* at 430-31; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens…not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."). Because the employer's job requirements operated "to 'freeze' the status

quo of prior discriminatory employment practices," and worked as "built-in headwinds" for the advancement of minority groups, the Court held that the requirements were unlawful if not proven to be job-related. *Id.* at 430-32; *id.* at 431 ("The touchstone is business necessity. If an employment practice cannot be shown to be related to job performance, the practice is prohibited."). Proof of a discriminatory motive was not necessary.

Griggs was not decided until after the ADEA was enacted. *Griggs* therefore could not have informed Congress' judgment in drafting the ADEA. Overlooking this point, along with *Griggs'* focus on the perpetuation of past discrimination, several courts of appeals had simply assumed that the disparate impact theory was available to ADEA plaintiffs. *See* Pet. Br. 35 n.20 (citing cases). Contrary to Petitioners' assertion (Pet. Br. 35), however, this view did not go unquestioned. *See Pavlo v. Stiefel Labs., Inc.*, Civ. No. 78-5551, 1979 WL 105, at *9 n.22 (S.D.N.Y. Nov. 27, 1979) (questioning *Griggs'* applicability to the ADEA); *Williams v. City and County of S.F.*, 483 F. Supp. 335 (N.D. Cal. 1979).

In 1993, this Court's reasoning in *Hazen Paper*, which focused on congressional intent and the difference between age and other forms of discrimination, strongly pointed toward the conclusion that the disparate impact theory is not available under the ADEA. *See* 507 U.S. at 609-11; *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1999) (*Hazen*'s "inescapable implication" is that disparate impact would not address evils that ADEA was designed to eliminate); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996) (*Hazen* gives "strong impression" that the ADEA does not encompass a disparate impact claim). The Court held that an employment decision that is motivated by a factor that merely correlates with age, but is analytically distinct from age, does not violate the statute. The Court reasoned that, because the impetus of the ADEA was

Congress' "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," disparate treatment—with its focus on motive—"captures the essence of what Congress intended to prohibit." *Id.* at 610. When the employer is motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. *Id.* at 611.

Hazen Paper made clear that the ADEA is a different statute with a different history and purpose than Title VII. The disparate impact theory should not be mechanically transplanted into the ADEA without first reexamining *Griggs*' rationale in light of those differences. *Mullin*, 164 F.3d at 701 (divergence in purpose between Title VII and ADEA counsels against mechanistic adherence to *Griggs*); *see Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) (inappropriate simply to transplant Title VII standards into a different statutory scheme having a different history). *Griggs*' rationale is not applicable to the ADEA for two reasons, discussed below. First, *Griggs*' policy justification for developing the disparate impact theory was aimed at invidious race discrimination and is not transferable to the ADEA context. Second, the policy-based interpretation of Title VII that underpins *Griggs* was not derived from a strict focus on the statutory text and structure and, under this Court's more recent statutory construction cases, should not be extended beyond the setting in which it was first adopted.

A. Age Discrimination Fundamentally Differs From Race Discrimination.

Although the purpose of both the ADEA and Title VII is to eliminate discrimination in the workplace (Pet. Br. 25), the realities of race and age discrimination differ substantially. During the debates on Title VII, proposals were made to include age discrimination within its prohibitions. *EEOC v. Wyoming*, 460 U.S. 226, 229-30 (1983). Such

legislation was deferred, however, because Congress had too little information to make a considered judgment about the nature of age discrimination. *Id.* Suspecting that age differed fundamentally from race and other types of discrimination, Congress directed the Secretary of Labor to study the causes and effects of age discrimination and to prepare a report and recommendations on the need for (and scope of) any age legislation. The Secretary of Labor subsequently issued *The Older American Worker: Age Discrimination In Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965) (the "Labor Report").

Unlike race discrimination, the Report found "no evidence of prejudice based on dislike or intolerance of the older worker." Labor Report at 6; *id.* at 2 ("discrimination" based on age "means something very different" than race discrimination). According to the Report, age-based intolerance is unusual because the process of aging "is inescapable, affecting everyone who lives long enough," and people of all ages "liv[e] in close association rather than in separate and distinct social or economic environments." *Id.* at 6. Thus, "age" is not a restricted class in which segregation and lack of association with other groups may breed rigid biases, such as the racial prejudice confronted in *Griggs*. The Report also found that some work-related abilities do correlate with the inevitable process of aging and that this further distinguishes age from other characteristics like race or ethnicity.[2] Thus, adverse assumptions about older

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[2] *See* Labor Report at 2 (identifying acts not appropriately called "discrimination," such as "decisions not to employ a person for a particular job because of his age when there is in fact a relationship between his age and his ability to perform the job"); *Senate Hearings* at 39 (statement of Secretary of Labor) (challenge in age legislation was drawing a distinction between cases in which age is relevant to

employees' abilities, if examined, sometimes will prove true. Examples noted by the Labor Report include chronic illness, less education, less mobility, lack of transferability of job skills and experience to meet new technology, and less proficiency in testing. Labor Report at 11-15. Therefore, the virtually irrefutable presumption of equaling that is at the core of the legislation prohibiting racial discrimination is not applicable to people in different age groups.

B. The Court's Contemporary Framework For Statutory Construction Precludes Creation Of A Disparate Impact Claim.

The Court has increasingly emphasized that the interpretation of a statute must begin with its text. *See Alexander v. Sandoval*, 532 U.S. 275, 286-88 (2001) (delineating evolution of statutory construction from *J.J. Case Co. v. Borak*, 377 U.S. 426 (1964) to *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)). The focus of statutory interpretation has shifted away from a generalized study of the purpose or spirit of an Act to a progressively sharper inquiry into congressional intent through an Act's language, structure, and legislative history. *See Touche Ross*, 442 U.S. at 578 ("[G]eneralized references to the 'remedial purposes' of the [statute] will not justify reading a provision more broadly than its language and statutory scheme reasonably permit."). A contemporary interpretation of the ADEA should follow the same framework. *See Alexander*,

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employment capacity and those in which it is not); *Senate Hearings* at 36, 37 (statement of Secretary of Labor) (it is an accepted part of the employment relationship "that when 'a person's age catches up to him' and diminishes his capacity and competence, he must accept the fair-minded economic judgment of those he works for…that his value has fallen below the break-even point").

532 U.S. at 287 (rejecting argument that statutes enacted prior to *Cort v. Ash*, 422 U.S. 66 (1975), should be interpreted within their own contemporary legal context). Before extending the disparate impact theory of *Griggs* to another statute, therefore, the Court should take into account not only the differences in context between race and age discrimination, discussed above, but also *Griggs*' emphasis on the "objective" and "thrust" of Title VII rather than on its text as a basis for determining congressional intent. *Griggs*, 401 U.S. at 429 ("objective" of Congress in enacting Title VII); *id.* at 432 ("thrust" of the Act directed to the consequences of employment actions).[3]

II. Congress Intended The ADEA To Proscribe Only Age-Motivated Discriminatory Conduct.

Petitioners primarily argue that, because *Griggs* interpreted Title VII to include the disparate impact theory, similar language in the ADEA must have the same meaning. Pet. Br. 11-17. As fundamental as the presumption that similar language is construed similarly, however, is the "cardinal rule that '[s]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Cline*, 124 S. Ct. at 1246. A review of the ADEA as a whole demonstrates that Petitioners are wrong in assuming that the liability provisions of Title VII and the

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[3] Petitioners exaggerate the extent to which *Griggs* "expressly rel[ied] on the text of Title VII." Pet. Br. 22. The Court's citation of 42 U.S.C. § 2000e-2(a)(2) in a footnote constituted its entire reliance on the text of the statute. *Griggs*, 401 U.S. at 426 n.1; *see Ellis*, 73 F.3d at 1007 n.13 (*Griggs* was not based on Title VII's text, but looked primarily to its larger objectives); George Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 724 (1979-80) ("The legal and moral force of *Brown v. Board of Education* has caused the federal courts to favor claims of racial discrimination, most significantly through judicial creation of the theory of disproportionate adverse impact.").

ADEA are identical. Liability under the ADEA is determined by both § 623(a) and § 623(f)(1)—the latter of which has no counterpart in Title VII. This difference "creates a critical 'asymmetry' between the ADEA and Title VII," which shows that the statutes should not be interpreted identically. *Smith*, 351 F.3d at 190-91. For the reasons below, § 623(a)(2) requires a showing of age-motivation.

A. The Language Of § 623(a) Proscribes Only Disparate Treatment.

The language of § 623(a)(2) confirms what *Hazen Paper* implied: Age-motivation is a required element of a cause of action under the Act. The Section reads as follows:

> It shall be unlawful for an employer…to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2). Section 623(a)(2) prohibits conduct taken "because of" such individual's age, which means "on account of" or "by reason of" age. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 159 (4th ed. 2000). This language requires age-motivation.[4] Age-motivation is

[4] D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. Cal. L. Rev. 733, 739, 751 (1987) [hereinafter "Welch, *Removing Barriers*"] (the phrase "because of" reflects motive); *Ellis*, 73 F.3d at 1007 (most obvious reading of "because of such individual's age" is that it prohibits an employer from intentionally discriminating); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 281-82 (1989) (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").

the linchpin of disparate treatment claims;[5] disparate impact cannot be used as a surrogate.[6] Consequently, the only reasonable reading of § 623(a)(2) is that it proscribes disparate treatment.

In an attempt to force disparate impact into the meaning of § 623(a)(2), Petitioners argue that the key prepositional phrase "because of such individual's age" modifies the verb "affect," rather than the earlier verbs "to limit, segregate, or classify." Pet. Br. 23. Petitioners' position is inconsistent with normal English usage. The comma immediately preceding the "because of" phrase signals that the phrase is out of its natural order. INSTANT ENGLISH HANDBOOK 276 (1993 ed.) (a comma typically is not used after an adverbial dependent clause). Instead, the

[5] *Hazen Paper*, 507 U.S. at 610-11 (liability in a disparate treatment case depends on whether the protected trait motivated the employer's decision). Although the phrase "intent to discriminate" often has been used in ADEA and Title VII cases, the Court has made clear that it means "motivated" by a protected trait. *E.g., McDonnell Douglas*, 411 U.S. at 802 (emphasizing the employer's reason and the question of "racial motivation"); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (using term "intentional discrimination" but focusing on employer's "reasons"); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (focusing on "motive"); *see* Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 766-72 (despite courts' use of the term "intent," the ultimate issue in disparate treatment is motivation).

[6] *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 519 (2003) (because the factual issues and character of the evidence differ between the disparate impact and disparate treatment theories, "courts must be careful to distinguish between these theories"). The disparate impact theory eliminates motive as a material issue. If, as we argue, a showing of motive is required under the ADEA, disparate impact alone cannot create liability. *Hazen Paper*, 507 U.S. at 610 (a disparate treatment claim fails unless the employee's protected trait had a determinative influence on the outcome).

comma signals that the phrase "because of" is out if its natural order. *Id.* at 281; *see also* Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 843 n.27 (1982) [hereinafter "Krop, *Age Discrimination*"] (grammatical construction of § 623(a)(2) should be interpreted to allow only disparate treatment); *DiBiase*, 48 F.3d at 733-34 (relying on Krop's grammatical analysis). Thus, the phrase "because of such individual's age," should be read to modify "to limit, segregate, or classify." This construction requires a showing of age-motivation and authorizes only claims of disparate treatment. Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843.

To counter this conclusion, Petitioners argue that, since the singular noun used in the phrase "because of such *individual's* age" does not match the plural form used in "to limit, segregate, or classify his *employees*," the former must not modify the latter. Pet. Br. 23-24. The better reading is to interpret use of the singular noun "individual" as reflecting congressional intent to create a standing requirement by restricting claims of age discrimination to persons who actually were adversely affected by the discriminatory practice. Making it unlawful to limit, segregate, or classify employees in a way that would deprive any of them of employment opportunities because of age could be interpreted to authorize a person who was not actually subjected to the unlawful practice to bring a lawsuit. It is clear that Congress meant to preclude this result.[7]

[7] Although, since the 1972 amendments to Title VII, an individual can file a charge "on behalf" another, the amendments did not change Title VII's requirement that only the actual victim of discrimination can receive a right-to-sue notice and file a civil lawsuit. *See* 42 U.S.C. § 2000e-5(f)(1) (notice of right to sue shall be given to "the person aggrieved," after which "a civil action may be brought…by the person

Petitioners' further insistence (Pet. Br. 22) that the phrase "because of" does not typically refer to an actor's state of mind but instead means causation is misguided. As discussed above, the phrase "because of" is routinely interpreted to refer to motive. Although "[m]otive is a causal concept,"[8] in legal parlance, motive typically refers to a subjective state of mind.[9]

Petitioners contend that, if Congress truly meant to require a subjective showing of age-motivation, it would have used a term such as "willful," "knowing," "deliberate," or "malice." They argue, for example, that Congress could have used words more akin to 42 U.S.C. § 1981a(b)(1)'s requirement of "malice" or "reckless indifference" to prove liability for punitive damages. But these states of mind differ from motive. *See Kolstad v. Am. Dental Ass'n,* 527 U.S. 526,

claiming to be aggrieved"). The same is true for the ADEA. 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction …"). The language in § 623(a)(2) focusing on the "individual" ensures proof not just of a policy to segregate because of protected status, but also proof that the practice adversely affected the individual bringing the lawsuit. *See Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("Title VII prohibits discriminatory practices, not an abstract policy of discrimination.").

[8] Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 739; AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1148 (4th ed. 2000) ("motive" is an "emotion" or "desire" "that acts as an incitement to action"; "causing or able to cause motion")

[9] *E.g., U.S. v. Cintolo*, 818 F.2d 980, 1000 (1st Cir. 1987) ("Motive is, by definition, subjective in nature; it is a state of mind that is shown by proving the emotion that brings it into being."); *U.S. v. LaRouche Campaign*, 695 F. Supp. 1265, 1271 (D. Mass. 1988) (in legal discourse, "motive" concerns reasons for desiring certain consequences and is a state of mind).

536 (1999) (showing of intentional discrimination does not necessarily give rise to punitive damages liability under the "reckless indifference" standard). Similarly, liability based on "knowledge" would penalize a foreseeable outcome irrespective of the employer's motivation. Because Congress intended instead to require a showing of motive, it used the suitable phrase "because of."

Furthermore, use of the particular terms "limit," "segregate," or "classify" prior to the phrase "because of such individual's age" supports an interpretation of § 623(a)(2) that prohibits only age-motivated practices. These terms all suggest that the conduct Congress sought to address were express age-based categorizations that adversely affect older workers. The verb "limit" means "[t]o confine or restrict within a boundary or bounds." THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 1016 (4th ed. 2000). "*Limit* refers principally to the establishment of a maximum beyond which a person or thing cannot or may not go." *Id.* The verb "segregate" means to "separate or isolate from others," "to impose the separation of (a race or class) from the rest of society," and to "practice a policy of racial segregation." *Id.* at 1577. The verb "classify" means to "arrange or organize according to class or category." *Id.* at 343. All of these terms essentially mean "discrimination," and do not connote facially neutral practices that coincidentally have adverse effects on a protected group.

"Segregate," for example, makes no sense unless there is some definition of one class that is separated or isolated from the others. "Segregate" makes most sense when linked to the subsequent phrase—"because of such individual's age"—which defines the relevant classes. The

same is true for "limit" and "classify."[10] As Petitioners repeatedly note, Congress borrowed the language in § 623(a)(2) from Title VII. Title VII's historical context—in which school segregation by race, for example, and express sex and race-based job classifications prevailed—clarifies what conduct Congress sought to remedy when it prohibited employers from, for example, segregating employees because of race in a way that deprives particular individuals of job opportunities. *See Griggs*, 401 U.S. at 427 (segregation of departments by race); *United Air Lines v. Evans*, 431 U.S. 553 (1977) (no-marriage rule applied only to female employees). This understanding applies equally to the ADEA, which sought to eliminate these kinds of express age "limits" and "classifications," which frequently were used against older workers. *E.g.* Labor Report at 21 (discussing "persistent and widespread use of age limits in hiring"). When read as a whole, § 623(a)(2) requires a showing of age-motivated discrimination and can be interpreted to authorize only disparate treatment claims.

In any event, under any of the proposed interpretations of § 623(a)(2), Petitioners do not state a cause of action. Petitioners challenge a pay plan that resulted in higher salary increases for police officers and safety

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[10] That this is the intended meaning of § 623(a)(2) is made clear by contrasting it to the confusion created by Congress' use of the ambiguous term "discriminate" in Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act (NLRA) without also adding the term "because of union membership." *See generally Note, Discrimination and the NLRB: The Scope of Bd. Power Under Sections 8(a)(3) and 8(b)(2)*, 32 U. Chi. L. Rev. 124 (1964) [hereinafter "*Discrimination and the NLRB*"]. Congress' use of more definite terms in the ADEA with the same connotation as "discrimination" and the qualifier "because of age" indicates congressional intent to ensure a requirement of unlawfully motivated discrimination.

dispatchers with five or fewer years of tenure. *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 185 (5th Cir. 2003). Even accepting Petitioners' definition of "because of" to mean causation (rather than subjective motive) and their view that the phrase modifies "affect" rather than "to limit, segregate, or classify," their critical mistake is in failing to recognize that § 623(a)(2) prohibits adverse actions or effects that are "caused" by age, not simply adverse actions that affect older employees. Petitioners' disparate impact claims do not allege that the pay plan was motivated by age; was caused by conscious or subconscious stigmatizing stereotypes; or even that the aging process impaired performance, which caused a difference in pay for older workers under the pay plan. Instead, Petitioners simply argue that the pay plan harmed older workers through lower pay increases. But § 623(a)(2) prohibits limitations or classifications that adversely affect an individual "because of such individual's age," not simply acts that "have an adverse effect on older workers." Pet. Br. 20. The pay plan affected Petitioners "because of" their tenure. This situation varies drastically from *Griggs*, where the Court found that the disparate effect was "directly traceable to race" because African-Americans had been deprived of the skills to demonstrate their true abilities through tests due to poor education in racially segregated schools. In that context, and unlike here, an individual's race (and prior race segregation) could be viewed as "causing" the high failure rate on the test. Accordingly, under any interpretation of § 623(a)(2), Petitioners do not state a claim for age discrimination.

B. Section 623(f)(1) Confirms That The ADEA Does Not Proscribe Disparate Impact.

Petitioners admit that this Court consistently has construed Title VII and the ADEA differently where the text and statutory structure differ—at least "outside the scope of

the two statutes' identical liability provisions." Pet. Br. 15. Their presumption that the liability provisions in the two statutes are identical ignores the effect of the "reasonable factors other than age" (RFOA) clause in § 623(f)(1) of the ADEA. The combination of the prohibitory language in § 623(a) and the exception language in § 623(f)(1) confirms that the ADEA proscribes only disparate treatment. Section 623(f), in relevant part, reads as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization… to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section…where the differentiation is based on reasonable factors other than age….

29 U.S.C. § 623(f). By its plain language, an otherwise prohibited age "differentiation" is lawful if it is based on factors other than age. Accordingly, decisions based on non-age factors that have a disparate impact on older workers are not unlawful under the RFOA clause. *See Mullin*, 164 F.3d at 700-01 (RFOA clause eliminates disparate impact claims); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 734 (3d Cir. 1995) (RFOA clause indicates that neutral employment policies not improperly motivated may be permissible).

Petitioners and their *amici* —faced with the fact that § 623(a)(2), by its own terms, does not authorize a disparate impact claim—argue that authorization for a disparate impact claim is somehow implied by § 623(a) when read in conjunction with the RFOA clause. Apart from demonstrating that the ADEA is not a model of legislative drafting—a fact conceded by all—their arguments are ultimately unpersuasive.

1. The Meaning Of "Otherwise Prohibited" In § 623(f)(1) Derives From The Legal Context Of The ADEA's Enactment.

Petitioners contend that, because the RFOA excuses liability for "otherwise prohibited" conduct when the differentiation is based on factors other than age, the RFOA "necessarily implies that it is possible to violate section [623(a)] through differentiation based on a factor other than age." Pet. Br. 19. This argument is not the best explanation for the interplay between §623(a)(2) and §623(f). The meaning of the "otherwise prohibited" language is clarified by the legal and historical context in which the statute was enacted. That context does not support the claim that the RFOA indicates intent to authorize a disparate impact claim.

At the time the ADEA was enacted in 1967, there was ambiguity surrounding the concept of causation. Title VII and the ADEA both were enacted prior to decisions defining the necessary causal relationship between the improper motive required to trigger liability and the overt act of discrimination. Francis J. Vass, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 456 (1965-66) [hereinafter "Vass, *Title VII: Legislative History*"]. The issue is illustrated by the proposed amendment to the original Title VII seeking to limit liability to instances where the alleged discrimination was *solely* because of race, color, religion, sex, or national origin. *Id.* Congress rejected the amendment, but the fact that the proposal was made at all "points up what [was] a continuing issue under the Labor Management Relations Act (LMRA)." Vass, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. at 456. The issue under the LMRA was whether the improper motive must be the dominant factor, a substantial contributing factor, or merely a factor leading to the overt act. *Id.* The federal courts had required a showing that an unlawful factor was "dominant."

E.g., Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 620-21 (5th Cir. 1961) (determination of whether employer committed unlawful discrimination under NLRA depends on whether anti-union animus was the dominant motive). This was not an affirmative defense; the General Counsel was required to satisfy the "dominant" factor test to prove liability in the first instance. The NLRB had required the lesser showing that the unlawful factor was a motive in part. *See Wright Line*, 251 N.L.R.B. 1083 (1980) (tracing history of difference between NLRB and federal courts concerning dual motives). The issues of causation and its proof were clarified after the enactment of the ADEA by a series of decisions including *McDonnell Douglas*' pretext analysis, *Mt. Healthy City of School District Board of Education*, 429 U.S. 274, 287 (1977) (if plaintiff shows unlawful consideration was "a motivating factor," employer has opportunity to show it would have reached the same conclusion even in the absence of the unlawful consideration), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (same).

The notion of causation was further refined by the Civil Rights Act of 1991, which amended Title VII to respond to the "mixed motive" analysis adopted in *Price Waterhouse v. Hopkins*. *See* 42 U.S.C. § 2000e-5(g)(2)(b) and § 2000e-2(m). Under 42 U.S.C. § 2000e-2(m), if the plaintiff proves that an identified protected trait was "a motivating factor," a violation is established "even though other factors also motivated the practice." Once a Title VII plaintiff proves a violation of § 2000e-2(m), she is entitled to certain limited relief under § 2000e-5(g)(2)(b), even if the employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(b).

Congress did not similarly amend the ADEA. *See Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000) (Section 2000e-5(g)(2)(B) did not amend the ADEA and therefore is inapplicable to ADEA claim). This mixed motive framework would be inappropriate under the ADEA because, unlike Title VII, Congress intended liability under the ADEA to be triggered only when the unfair practice was motivated *solely* by age. *E.g.*, 113 CONG. REC. 31,255 (1967) (remarks of Sen. Javits) (question under ADEA as to whether the Act was violated is: "Was the individual discriminated against *solely* because of age?"); 113 CONG. REC. 1377 (1967) (statements of Secretary of Labor) ("The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age…would not fall within the proscription."). Section 623(f)(1) makes this absolutely clear. Therefore, unlike under Title VII, a plaintiff will not prevail under the ADEA merely by showing that age played *a* motivating role. *Cf. Hazen Paper,* 507 U.S. at 609 (disparate treatment claim cannot succeed unless protected trait played a role *and* had a determinative influence on the outcome). Thus, the "otherwise prohibited" language in § 623(f)(1) can be understood to allow employment decisions in which age is "a" motivating factor, so long as the employer would have made the same decision based on non-age factors.

This conclusion is reinforced by the further ambiguity surrounding the concept of "intentional" discrimination. When Title VII and the ADEA were enacted, courts' interpretation of Section 8(a) of the NLRA had replaced the concepts of "intent to discriminate" and "motivation" with a test for "foreseeable consequences." *See Discrimination and the NLRB,* 32 U. Chi. L. Rev. at 127-28 (courts blurred distinction between "motive" and "intent," the latter of which was easily inferred from the probable consequences of

employer action); *Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181, 193, 196 (1962) (Chairman McCulloch, dissenting) (criticizing majority for inferring "motive" to encourage or discourage union membership solely from the "foreseeable result[s]" of the challenged conduct); *see also U.S. v. Tex. Educ. Agency*, 564 F.2d 162, 165-170 (5th Cir. 1977) (rejecting prior rulings that "intent" to discriminate could be shown, without regard to subjective motive, based on the common law principle that an actor is objectively held to intend the reasonably foreseeable results of his actions). Such a test would be particularly inappropriate under the ADEA, where an employer may very well foresee a disparate statistical impact on older workers simply because it relies on a legitimate factor, such as seniority, which is empirically correlated with age. Section 623(f)(1) ensures that age-motivation (rather than some variation of "intent") retains a central role in ADEA cases. With this understanding, the "otherwise prohibited" language makes sense. The ADEA allows an employment decision that has a foreseeable impact on older workers, so long as the employer's decision would have been the same irrespective of age.

2. The RFOA Clause Is Not An Affirmative Defense.

In a related argument, *amicus curiae* contends that the "otherwise prohibited" language in § 623(f)(1) means that the RFOA does not come into play until a violation of the ADEA has been established and that, therefore, the RFOA is an "affirmative defense." Br. of Nat'l Employment Lawyers Ass'n (NELA) at 19. This argument is incorrect.

The RFOA clause is not an affirmative defense. It is a definitional provision underscoring what "shall not be unlawful" discrimination under § 623(a). *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1988). The ADEA's legislative history confirms this interpretation.

E.g., 113 CONG. REC. 1377 (1967) (statements of Secretary of Labor) ("The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age…would not fall within the proscription.").

The fact that the bona fide occupational qualification (BFOQ) clause—the clause preceding the RFOA in § 623(f)(1)—has been interpreted to be an affirmative defense, *see* NELA Br. 20-21, does not alter this conclusion. There is no clear indication that the enacting Congress intended either clause to be an affirmative defense. The prefatory language of § 623(f)—indicating that the subsequent clauses define what is *not* unlawful activity—suggests otherwise. In any event, the RFOA differs from the BFOQ. The latter addresses practices that are based solely and expressly on age—not practices based entirely or additionally on factors *other* than age. This significant difference supports the view that the RFOA is a definitional provision, notwithstanding the BFOQ interpretation of the affirmative defense.

NELA's additional arguments based on the Older Workers Benefit Protection Act of 1990 (OWBPA) also fail. NELA Br. 15-24. The OWBPA amended the ADEA by expressly placing the burden of proof on the employer to prove the bona fide seniority system and the bona fide employee benefit plan exceptions in § 623(f)(2). *See* Pub. L. No. 101-433, § 103, 101 Stat. 978. The OWBPA's amendments were specifically designed to overturn the Court's interpretation of the ADEA in *Public Employees Retirement Systems v. Betts*, 492 U.S. 158 (1989). There, the Court held that an employee challenging the validity of a facially age-based employee benefits plan under the ADEA bears the burden of proving that the employer had adopted the plan as a subterfuge for intentional age discrimination. *Id.* at 181. Although the OWBPA altered *Betts*' outcome, the

revision cannot be viewed as correcting the Court's reading of the ADEA, as NELA suggests. *See* NELA Br. 15-18. The better view is simply that the 1990 Congress in the OWBPA altered the burden that previously existed under the ADEA with respect to proving the bona fides of a seniority system or employee benefit plan.

However the OWBPA may have modified the burden of proof for the BFOQ under § 623(f)(2), it made no changes to the RFOA clause. In fact, although both the Senate and House bills proposed to revise § 623(f)(1) to expressly allocate the burden of proof to the employer,[11] this provision was deleted from the final bill that ultimately became the OWBPA.[12] Thus, NELA's notion that the RFOA clause should be treated as an affirmative defense is unfounded. The OWBPA suggests no such thing.

3. The Word "Reasonable" In The RFOA Clause Does Not Imply The Concept Of "Business Necessity."

Whether or not the RFOA clause is viewed as an affirmative defense, it is clear that "motive" is the key inquiry under the ADEA. Thus, the RFOA clause's use of the term "reasonable" cannot be read to require a showing of "business necessity," which forces an employer to justify its practice as essential (whatever its motive may have been). Indeed, since the disparate impact theory had not yet been

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[11] *See* H.R. REP. 101-664, at 3, 46-47 (1990) (BFOQ exception in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof); S. REP. No. 101-263, at 2, 29-30 (1990) (employer bears burden to plead and prove defenses in section 4(f)).

[12] *See* 136 CONG. REC. 13,596-97 (1990) ("not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law").

formulated at the time the ADEA was enacted, Congress was contemplating no such thing. The term "reasonable" merely reflects the ADEA's recognition that stereotypical assumptions about older workers' ability to do the job may have a basis in fact in individual cases. In this context, the term "reasonable factors" is in contradistinction to the words "assumed" or "arbitrary."[13] "Reasonable" means rational and in accordance with reason or sound thinking. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1457 (4th ed. 2000).[14] Contrary to Petitioners' argument, the RFOA is not "mere surplusage" under this analysis: The RFOA's function is to differentiate between unlawful age stereotyping and lawful employment decisions where, even if age could be said to be "a" factor, the decision was reasonably based on factors other than age. For decisions in

[13] 113 CONG. REC. 31,254 (1967) (remarks of Sen. Yarborough) ("a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief" about the capabilities of older workers); *Senate Hearings* at 39 (statement of Secretary of Labor) ("[This bill] does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is a legitimate relevance between age and employment capacity. The 'discrimination' it is directed against is the 'unjust' or 'arbitrary' distinction (which is what 'discrimination' is normally taken to mean) which may be made in the absence of any legitimate relevance between age and employment capacity."); *see also Discrimination and the NLRB*, 32 U. Chi. L. Rev. at 127 (discussing dispute about meaning of "discrimination" in Section 8(a)(3) of the NLRA and identifying various possible interpretations, including "differentiation or distinction without sufficient reason, a meaning commonly conveyed by use of the adjectives 'arbitrary' or 'invidious'").

[14] *See Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181, 185-86 (1962) (using "arbitrary" synonymously with the terms "irrelevant reasons" and "invidious" and indicating that, when different treatment is "based on race alone," it is "obviously irrelevant and invidious").

which age is not at all a factor—as in disparate impact cases—the determination that the ADEA was not violated requires no reference to § 623(f)(1).

For example, an employer could discharge an older worker for poor attendance due to chronic health problems, which problems were caused by age. If the company decision maker were asked at the time of the discharge what was in her mind, she might say, "I am firing the employee because his age has affected his health, and I can't rely on him anymore." Even though, in this example, the employer may believe that the employee's poor health is attributable to his advancing age, the employer can lawfully discharge the employee based on the attendance policy, even if that policy has a disparate impact on a group of older workers. If, however, the employer had simply assumed that the older employee was unreliable because of likely health problems related to age, and did not bother to test the assumption in that individual case, the discharge would be *solely* because of age and, therefore, unlawful.[15]

Even if, as in the example, the employer contemplates the employee's age or relies on a factor known to be correlated with age, the problem of inaccurate age stereotypes disappears if the employer's consideration of the individual's attendance is the dominant basis of the adverse decision. The employer's reliance on a factor that correlates with age would be unlawful only if the employer was not only aware of the correlation, but acted because of it. Since age stereotyping cannot be inferred simply from an empirical

[15] *See* Labor Report at 11 (it would not be reasonable to exclude all older workers from consideration for certain jobs because *as a group* they are more subject to health problems associated with growing older; the Report recognizes, however, that when older workers are considered on their merits, a proportion of them will fail to qualify).

correlation with a non-age factor, the disparate impact theory does not fit in the ADEA context. Rather, the flexible burden-shifting framework to examine motive established in *McDonnell Douglas* is well-suited for resolving the proper ADEA inquiry. The overly broad and burdensome "business necessity" affirmative defense would not serve that purpose.

C. Legislative History Shows Congress' Intent To Tailor The ADEA To Address The Specific Qualities Of Age Discrimination.

The ADEA's legislative history confirms that its language was intended to create a cause of action only for disparate treatment. The Labor Report identified factors that adversely affect older workers in employment, but, because of the unique qualities of ageism (discussed above), it recommended legislation to address only one: "arbitrary age discrimination." Labor Report at 21. Having no intent to recommend legislation against all factors that disparately affect older workers, the Secretary gave "arbitrary discrimination" a specific meaning: "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for this assumption*." Labor Report at 2 (emphasis in original); *see* Labor Report at 5 ("[T]he findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not."). Employment policies erecting age limits were the primary and repeated examples of such discrimination. *E.g.*, Labor Report at 6. When Congress enacted the ADEA, it expressly stated its focus on such "arbitrary" age discrimination. 29 U.S.C. § 621.

Petitioners' broad interpretation of the Labor Report to suggest otherwise relies on a misquotation and is simply wrong. The Labor Report did not say that "it would be

'futile as public policy' to focus solely on the elimination of explicit age limits." Pet. Br. 26 (citing Labor Report at 21). The passage, in fact, reads as follows:

> [T]he most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary'...."

Labor Report at 21. In other words, it would be futile to outlaw the entire spectrum of age restrictions. Based on the Labor Report's findings, Congress decided that other factors adversely affecting older workers' employment were more suitably addressed, not by legislation, but by education and training programs. *See* 29 U.S.C. § 622 (directing Secretary of Labor to develop an education and research program); *Senate Hearings* at 38-39 (statement of Secretary of Labor) (deliberate acts will be prohibited by the legislation; other acts will be remedied by research, education, and training – to do more would be premature); Labor Report at 22 (in instances of alleged arbitrary discrimination where the facts indicate that older worker needs reeducation, training, counseling, or health and other services, the individual should be referred to appropriate programs for assistance).

The ADEA's express focus on "arbitrary" discrimination demonstrates that it was intended to be narrower in scope than Title VII.[16] In contrast to the

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[16] Krop, *Age Discrimination*, 34 Stan. L. Rev. at 854 (Title VII's purpose is broader than the ADEA's, making disparate impact proper only for Title VII); Evan H. Pontz, Comment, *What a Difference the ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 299-300 (1995) (analyzing meaning of "arbitrary discrimination").

historical facts that Congress confronted when it addressed racial discrimination in Title VII, historical prejudices and lingering effects of prior discrimination do not justify a disparate impact claim under the ADEA. *Hiatt v. Union Pac. R.R. Co.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (unlike in *Griggs*, correlation between age and ability cannot be traced to a history of past discrimination). All older workers were once younger and able to make choices about their education, training, and employment free from age discrimination. Any current correlation between age and ability cannot be viewed as "directly traceable to" or "because of" lifelong age discrimination. *See Mullin*, 164 F.3d at 701 (age discrimination correlates with current job conditions, not past discriminatory practices); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 301, 313 (1976) (unlike race, the aged "have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"). Therefore, an employer's facially neutral practice that has a disparate impact on older workers cannot raise an inference that past discrimination is being perpetuated—there is no past discrimination to perpetuate. Older employees, in fact, may have benefited from past age discrimination during their careers. *Hiatt,* 859 F. Supp. at 1436 (individuals were previously younger and possibly beneficiaries of any age discrimination). Thus, *Griggs*' concern with avoiding the perpetuation of past discrimination simply does not apply in the ADEA context.

Further, although the particular evil of invidious discrimination and its distorting affects on decision making may be an additional reason for applying the disparate impact theory, this rationale is out of place in age discrimination cases. As the Labor Report established, invidious age prejudices are uncommon. In this context, the burden of proving "business necessity" is disproportionate to the harm

sought to be remedied. Under the circumstances alleged here, for example, disparate impact theory would require the City of Jackson to prove that there is a "compelling need" for its proposed more competitive salary structure and that there is "no alternative" to implementing that proposal. *See, e.g., Kirby v. Colonial Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980) (must show not merely routine business considerations, but a "compelling need," for which there is "no alternative"). The disparate impact theory, with no consideration of motive and a defense only of business necessity, is simply too broad and intrusive to serve as a well-tailored means of identifying and correcting age stereotypes. *See DiBiase,* 48 F.3d at 734 n.21 (disparate impact with its defense of business necessity could "subject employers to unreasonable intrusions by juries into their business practices," such as work schedules and medical insurance); Nathan E. Holmes, Comment, *The Age Discrimination in Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. Cin. L. Rev. 299, 323 (2000) (business necessity too intrusive a means to identify discriminatory motives and over-predicts age discrimination).

In sum, Petitioners' and *amici*'s analysis of the ADEA to require an inference of a disparate impact claim in § 623(a) does not withstand scrutiny. The only reasonable interpretation of the interplay between §§ 623(a) and 623(f)(1) is that Congress proscribed only age-motivated conduct in the former. The latter clarified that conduct for which age is "a" motivating factor is not unlawful if the same decision would have been made irrespective of age. Because motive plays an indispensable role under the ADEA, the disparate impact theory is not available.

D. The EEOC's Interpretive Guidelines Cannot Create A Disparate Impact Claim.

Although 29 C.F.R. § 1625.7(d) seeks to transplant disparate impact into the ADEA context and to interpret the RFOA clause to mean "business necessity," it is only an EEOC policy guideline. *See* 46 Fed. Reg. 47,724 (1981) (ADEA guidelines are only statements of EEOC policy and do not comply with legal requirements for rulemaking). The force of such guidelines is a function of their persuasive value. *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) (no *Chevron*-deference to guidelines). The EEOC provided no substantive analysis for adopting the disparate impact guideline. Because it simply assumed, on the basis of *Griggs*, that the disparate impact theory is available, the guideline is unpersuasive. *Smith*, 351 F.3d at 189 n.5.

More importantly, "[e]ven for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Cline*, 124 S. Ct. at 1248. For the reasons discussed at length above, the ADEA, properly read in the context in which it was enacted, proscribes only disparate treatment. Neither the statute's language nor its history permit an inference of a disparate impact claim. The EEOC's decision to discard age-motivation in 29 C.F.R. § 1625.7(d) is inconsistent with the ADEA's language, both as originally enacted and as amended. It warrants no deference. *Betts*, 492 U.S. at 171 ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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